Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PHILLIP B. COONS and PETER C. COONS as Co-Personal Representatives of the Estate of Mary Jane Holmes, deceased, and CROTHERS AND HANSEN, P.C., an Oregon professional corporation.

Petitioners,

v.

ERIC M. HOLMES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Ninth Circuit follows the recent decisions of this court interpreting ERISA, and whether the Ninth Circuit properly interpreted Oregon State Law in ruling that ERISA preempts state probate law regarding a beneficiary who kills an insured?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Federal Circuit were Petitioners Phillip B. Coons and Peters C. Coons as Co-Personal Representatives of the Estate of Mary Jane Holmes, deceased, and Crothers and Hansen, P.C., an Oregon professional corporation, this corporation does not have any parent companies of subsidiaries and Respondent Eric M. Holmes

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Crothers and Hansen ("C & H") and Phillip B. Coons and Peter C. Coons, Co-Personal Representatives of the Estate of Mary Jane Holmes, deceased, (the "Estate") respectfully requests that a writ of certiorari issue to review the judgment entered on March 16, 1998 by the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In a memorandum opinion entered on March 6, 1998, the United States Court of Appeals for the Ninth Circuit concluded that ERISA

preempts the Oregon state "Slayer Statute," and that the Oregon Slayer Statute allows payment of the proceeds of the deceased's life insurance policy to the deceased's estranged husband, rather than her estate. Petitioners requested rehearing, which was denied on June 29, 1998.

JURISDICTION

The United States District Court had jurisdiction of this matter pursuant to the federal interpleader statute, 28 U.S.C. § 1335. The United States Court of Appeals had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et. seq. provides that, in part:

> ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employment benefit plan." 29 U.S.C. § 1144 (a).

ERISA's saving clause provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any laws of the United States or...any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

ORS 112.515 provides:

> **Proceeds of insurance on life and other benefit plans of decedent.** Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent of the following interests shall be paid to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent's estate:
>
> (1) A policy or certificate of insurance on the life of the decedent.
>
> (2) A certificate of membership in

any benevolent association or organization on the life of the decedent

(3) Rights of the decedent as a survivor of a joint life policy.

(4) Proceeds under any pension, profit-sharing or other plan.

STATEMENT OF THE CASE

On September 21, 1994, Mary Jane Holmes was murdered by her son, Dominic. At the time of her death, Mary Jane Holmes was insured through a group term life and accidental death insurance policy issued by Standard Insurance. Standard Insurance has admitted that it owes $80,000 and filed this complaint in interpleader to resolve the conflicting claims for this money.

On her Group Enrollment Form dated August 4, 1994, Mary Jane Holmes named her son Dominic as her beneficiary. Dominic has not made any claim to the insurance proceeds. The terms of the insurance policy provide:

> Beneficiary means a person you name to receive death benefits.
>
> *****
>
> If you do not name a beneficiary, or if you are not survived by one, benefits will be paid in equal shares to the first surviving class of the classes below:
>
> 1. Your spouse.
> 2. Your children.
> 3. Your parents.
> 4. Your brothers and sisters.
> 5. Your estate.

(Emphasis supplied.)

Defendant Eric Holmes was legally married to Mary Jane

Holmes at the time of her death, although they were estranged and almost divorced. The trial had been completed, the trial judge had issued an opinion letter, and Mary Jane's attorney had filed a motion to reconsider certain provisions of the trial court's opinion. As a result, a judgment dissolving the marriage had not yet been entered.

Mary Jane was in counseling because of her husband's alcoholism and abusive behavior. The divorce proceeding was contentious and bitter. Mary Jane was anxious for the proceeding to be final, and wanted to get away from her husband as quickly as possible, because of his threatening and abusive behavior. Mary Jane's intent, both at the time that she executed the insurance policy involved in this case, and at the time of her death, was to prevent her husband from obtaining any of the proceeds of this life insurance policy. Further, Mary Jane was not aware of the potential for her estranged husband to make a claim for the policy proceeds. In employment documents, Mary Jane referred to herself as "single," and referred to Eric Holmes as her ex-husband. The Ninth Circuit Memorandum Opinion results in Eric Holmes receiving the policy proceeds.

ARGUMENT

Three published federal district court opinions hold that ERISA does not preempt state slayer statutes. Curtis v. Prudential Ins. Co., 839 F. Supp. 491,494 (ED Mich 1993); New Orleans Elec. Pension Fund v. Newman, 784 F. Supp. 1233, 1236 (ED Louisiana 1992); Mendez-Bellido v. Board of Trustees, A.T.C., 709 F. Supp. 329 (EDNY 1989). This Ninth Circuit Memorandum opinion is the only federal case that counsel is aware of that holds that ERISA preempts a state slayer statute. This Court, in its recent decisions, has backed away from the notion that ERISA preempts virtually every state statute that might be considered as having some impact in the areas regulated by ERISA. The Ninth Circuit's decision in this case is completely inconsistent with this Court's recent pronouncements regarding the scope and application of ERISA.

The Memorandum Opinion Erroneously Ignores Recent Ninth Circuit and Supreme Court Case Law Regarding ERISA Preemption

Recently, the Ninth Circuit has adopted a limited view of ERISA preemption, following this Court. In the recent cases of Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Company, 135 F 3d 671 (9th Cir. 1998) and Ward v. Management Analysis Company Employee Disability Benefit Plan, 135 F 3d 1276 (9th Cir. 1998), "the Court has come to recognize that ERISA preemption must have limits when it enters areas traditionally left to state regulation - such as the state's exercise of police powers and its regulation of health, safety, banking, securities and insurance matters." Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Company, supra, 135 F 3d at 671. These recent cases stand for the proposition that ERISA no longer carries the preemptive weight that courts once attributed to it. This Court agrees. De Buono v. NYSA - ILA Med. and Clinical Serv. Fund, 520 U.S. 806, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).

The Memorandum Opinion contradicts recent Supreme Court and Ninth Circuit precedent. Here, ERISA should not operate to preempt the Oregon State Slayer Statute, which governs probate and insurance matters, an enclave typically reserved to state regulation.

The Memorandum Opinion Erroneously Interprets Oregon Law in an Issue of First Impression

The second basis for the Ninth Circuit Memorandum Opinion is an erroneous interpretation of Oregon state law. ORS 112.515, the Oregon Slayer Statute that disqualifies a slayer from obtaining the proceeds of a homicide, was drafted, after considerable discussion, in the 1960s. The legislative history of that statute shows that the definition of a beneficiary under the Oregon Slayer Statute is a beneficiary specifically named by the policyholder. In contradiction, the Memorandum Opinion relies upon a case decided by the Oregon Supreme Court in 1944, approximately 20 years prior to the adoption of the Slayer

Statute by the Oregon Legislature. The extensive legislative history regarding the redrafting of the Probate Code contains absolutely no reference to the case cited in the Memorandum Opinion, a case that is not on point, and a case that is now more than 50 years old. Because there is no Oregon Appellate opinion interpreting the definition of beneficiary, normal rules of statutory construction apply.

The policy provides that, if Mary Jane did not name a beneficiary, or if she were not survived by one, benefits will be paid to a certain surviving class of persons. The problem with this case is that Mary Jane did name a beneficiary, and she is survived by that beneficiary. Appellant would have the Court read the policy provision as stating that if Mary Jane did not name a beneficiary, or if her named beneficiary were in any way disqualified, then the surviving class should take the proceeds of the policy. The policy does not, however, state that. It is unambiguous, and under the unambiguous terms of the policy, Jonathon Dominic Holmes should receive the benefits.

Jonathon Dominic Holmes is, however, disqualified by the Oregon Slayer Statute. The only question, therefore, is what the Oregon statute means when it states that the proceeds ordinarily payable to the slayer "shall be paid to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent's estate." The crux of this matter is whether a "secondary beneficiary" under ORS 112.515 means a beneficiary specifically named by the policyholder or, as Appellant asserts, a boilerplate designation of certain classes of potential beneficiaries. If ORS 112.515 is construed to mean that a secondary beneficiary must be named by the policyholder, then there is no secondary beneficiary and the proceeds of this life insurance should be paid to the estate.

There are three potential methods of analysis of this problem. First, the policy provides some guidance as to what constitutes a secondary beneficiary. Second, Oregon insurance law provides additional guidance. Third, the legislative history of ORS 112.515 is helpful in determining the meaning of the language of the statute.

The policy at issue in this case is straightforward. A beneficiary is defined as "a person you name to receive death benefits."

Nowhere on the beneficiary card, or in the policy, is the possibility that a beneficiary might be disqualified from receiving benefits addressed. Both the beneficiary card and the policy appear to assume that a beneficiary will receive the proceeds as long as that beneficiary is living. Therefore, if there is a "secondary beneficiary" under the policy, it is a person that the policyholder has specifically named.

Further, the policy is ambiguous as to what should happen when a beneficiary is disqualified. An insurance contract is ambiguous if it is capable of more than one sensible and reasonable interpretation. Kelch v. Industrial Indemnity Co., 93 Or. App. 538, 542, 763 P.2d 402 (1988). If an insurance contract is ambiguous, the meaning of the ambiguous provision is a question of fact. McGaughey v. St. Paul Fire and Marine Ins. Co., 88 Or. App. 181, 183, 744 P.2d 598 (1987). If the policy is ambiguous, extrinsic evidence is admissible to show the intent of the parties. Timberline Equip. v. St. Paul Fire and Mar. Ins., 281 Or. 639, 643, 576 P.2d 1244 (1978). If the evidence reasonably permits different conclusions as to intent, the question of the meaning to be assigned to the policy is one of fact. A-1 Sandblasting v. Baiden, 53 Or. App. 890, 893, 632 P.2d 1377 (1981), aff'd., 293 Or. 17, 643 P.2d 1260 (1982).

The second general area of analysis is the use of Oregon insurance law to determine the meaning of "secondary beneficiary" under ORS 112.515. The Oregon Insurance Code does not separately identify "beneficiary." ORS 731.052 et seq. Although there is no general definition, the specific statutory scheme relating to group life insurance contains the following provision:

> A group life insurance policy shall contain a provision that any sum becoming due by reason of death of a person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary.

ORS 743.327(1)(Emphasis supplied). Therefore, the general Oregon scheme regarding group life insurance policies includes a provision that suggests that the Oregon legislature interprets "beneficiary" to mean

someone specifically designated by the policyholder.

As opposed to the language in ORS 731.052, which refers to a "beneficiary designated by the person insured," ORS 112.525, a statute related to the statute at issue in this case, refers to a situation in which "the policy or certificate names some person other than the slayer or the personal representative of the slayer as the secondary beneficiary." Accordingly, the Oregon Legislature understands the difference between a beneficiary designated by the policyholder and a beneficiary designated by the policy. Further, ORS 112.525 is directly connected to the subject statute in this case: ORS 112.525 concerns life insurance on the slayer, ORS 112.515 concerns life insurance on the decedent. The fact that the legislature used different language to describe the "secondary beneficiary" in those related statutes suggests that the legislature intended a separate meaning. Otherwise, the language of the statutes would be similar. When the Oregon legislature uses different language in similar statutory provisions, Oregon courts presume the legislature to have intended a different meaning. State v. Crumal, 54 Or. App. 41, 45, 633 P.2d 1313 (1981).

The third method of analysis is perhaps the most important: statutory construction. Oregon Courts follow the same rule regarding statutes as they do regarding insurance policies: If a statute is ambiguous, the Court will look to extrinsic evidence of legislative intent, such as legislative history, in construing the statute. Sager v. McClenden, 296 Or. 33, 40, 672 P.2d 697 (1983). In construing a statute, words of common usage should be given their ordinary meaning. Perez v. State Farm Mutual Ins. Co., 289 Or. 295, 299, 613 P.2d 32 (1980). Here, a beneficiary is commonly understood as a person designated by the policyholder to receive benefits under the policy. It is much less common that a beneficiary would be understood to be someone designated by the insurance company. Webster's New Collegiate Dictionary defines "beneficiary" as "the person named (as in an insurance policy) to receive proceeds or benefits."

The statements of committee members responsible for a bill's passage are relevant in determining the intent of the legislature. Further, reports of commissions charged with reforming the law are given great weight in interpreting the laws that are eventually passed. State

9ex rel Cox v. Davidson Ind., 291 Or. 839, 844, 635 P.2d 630 (1981) (statements of committee members); Jones v. Wallace, 291 Or. 11, 17, 628 P.2d 388 (1981) (Citing as helpful the Criminal Law Revision Commission and the Commission on Uniform State Laws).

Beginning in 1964, the legislature appointed an interim committee to revise the Oregon Probate Code. Counsel's thorough review of the legislative history shows that substantial effort was put into revising the Probate Code. The interim committee met for approximately one and a half days virtually every month on almost fifty occasions over a period of four years and drafted the proposed Probate Code revisions contained in the Supplemental Excerpt of Record. The first draft, dated March 23, 1967, p. 2, stated:

> Section 4. Other property. (1) Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent of the following interests pass to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent: (a) Policy or certificate of insurance.

The use of the phrase "secondary beneficiary" continued into the second draft, dated August 25, 1967. As pointed out in the comments to the second draft, prepared by Mr. Allison, one of the principals of the interim committee, the committee relied upon the 1965 Washington Probate Code, the 1963 Iowa Probate Code, ORS 111.060, the Uniform Probate Code and 49 Harv. L. Rev. 715 (1936). The portion of the proposed law that would ultimately become ORS 112.515 had become section 7 of the second draft, and Mr. Allison described it as "a general paraphrase of paragraph 2 of ORS 111.060." It is important to note that former ORS 111.060, provided that the proceeds of the life insurance policy in which a beneficiary had been disqualified by slaying the policyholder should "become subject to distribution among the other heirs of the deceased person according to the rules of descent and distribution in case of death as provided by law." Former ORS 111.060(3). In other words, no reference was made to a secondary beneficiary.

The UPC, in effect at the time, simply stated that the policy proceeds "shall become payable as though the killer had predeceased the decedent."

Most importantly, a proposal was submitted to the Probate Law Revision Advisory Committee during the meeting that occurred on November 17-18, 1965. In the November 1965 meeting, a proposal denominated "Proposal Number 7" was submitted to the committee. That proposal stated:

> Proceeds payable to or for the benefit of the slayer as the beneficiary or assignee of any policy or certificate of insurance or certificate of membership issued by any benevolent association or organization on the life of the decedent...shall be paid instead to the personal representative of the decedent, unless the policy, certificate or plan designates some person other than the slayer of his estate as secondary beneficiary to him in which case such proceeds shall be paid to such secondary beneficiary in accordance with the applicable terms thereof.

Although the committee minutes from November 17-18 indicate that section 8 of Proposal Number 7 was, after slight language revision, approved, the language of Proposal Number 7 was never placed in the ultimate bill. The difference between Proposal Number 7 and the ultimate bill is marked. Under Proposal Number 7, a secondary beneficiary could be designated by "the policy, certificate or plan." Under the law that was ultimately proposed to the legislature and adopted, the original language simply naming the "secondary beneficiary" remained intact. The legislature rejected the language of Proposal Number 7, considered by the interim committee, in favor of the language contained in the current statute. That language, indicating that the slayer is disqualified in favor of a secondary beneficiary, and if there is none, the estate, remained consistent beginning with the original draft created in early 1967. ORS 112.515 has not been amended since it became law as part of Senate Bill 506 in 1969. Because the legislature rejected language that would have indicated that the policy could designate some person other than the slayer as secondary beneficiary, it

shows legislative intent to interpret the phrase "secondary beneficiary" as a person named specifically by the policyholder, not a person named by the policy.

CONCLUSION

The Ninth Circuit opinion in this case defies this Court's recent interpretation of ERISA, and ignores those federal district court decisions that have held, appropriately, that ERISA does not preempt state slayer statutes. This Court should accept review of this case, because this Court has never examined the interaction between ERISA and a state slayer statute. Because the Ninth Circuit opinion inappropriately held that ERISA preempts this state slayer statute, the Court should reverse the decision of the Ninth Circuit, and remand the case to the District Court for entry of judgment in favor of petitioners.

RESPECTFULLY SUBMITTED this 29 day of January, 1999.

Kevin T. Lafky OSB#85263
Attorney for Crothers & Hansen

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 96-36299

PHILLIP B. COONS and PETER C. COONS, representatives of the Estate of Mary Jane Holmes, deceased; CROTHERS AND HANSEN, P.C., an Oregon professional corporation,

Plaintiff-Appellant,

v.

ERIC M. HOLMES,

Defendant-Appellee.

Filed March 16, 1998

In this interpleader action, the district court granted summary judgment to appellees and denies summary judgment to appellant Eric Holmes. We have jurisdiction under 28 U.S.C. § 1291, and we reverse both rulings. Because the parties are familiar with the facts of this case, we do not repeat them here.

We need not resolve whether the Oregon Slayer Statute, OR. Rev. Stats. § 112.515, is preempted buy the Employee Retirement Income Security Act of 1974 9"ERISA"), 29 U.S.C. § 1001 et. seq., because the outcome of the case would be the same either way.

If ERISA preempts the slayer statute, we resort to federal com

mon law in place of preempted state law. McClure v. Life Ins. Co. Of N. Am., 84 F. 3d 1129, 1133 (9th Cir. 1996); see also Metropolitan Like Ins., Co. v. Pressley, 82 F. 3d 126, 129 (6th Cir. 1996). Federal common law refuses to let a slayer receive the life insurance proceeds of his victim. Mutual Life Ins. Co. v. Armstrong, 117 U.S. 591, 599 (1886). The slayer thus disqualified, Holmes takes as the spouse of the decedent.

In the absence of preemption, Holmes still wins. Oregon law disqualifies the slayer. Or. Rev. Stats. § 112.515(1). And we reject appellee's argument, embraced by the district court, that § 112.515's reference to the "secondary beneficiary" means only someone whose name is actually written on the policy by the insured. Rather this term also includes someone who takes under the default provisions of the life insurance policy. Odom v. Prudential Ins. Co., 145 P. 2d 480, 481 (Or. 1944).

REVERSED and REMANDED with instructions to enter summary judgment for appellant.

Before: FERNANDEZ, RYMER and TASHIMA, Circuit Judges

APPENDIX B

United States Court of Appeals for the Ninth Circuit

Filed June 29, 1998

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Red. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Before: FERNANDEZ, RYMER and TASHIMA, Circuit Judges